



ings, the welfare hearings of the Department of Social Services, the Coastal Commission, and numerous other agencies not covered by the adjudication sections of the existing APA.

10. Of course, other legislation may expand the coverage of OAH, make ALJ decisions final, or transfer the adjudicatory power of agency heads to a separate administrative court. For example, the Alcoholic Beverage Control Appeals Board and the State Bar Court are autonomous bodies that are separated from the investigation and prosecution units of the ABC or the State Bar. In addition, it is possible that legislation will make final the decisions of ALJs in cases involving medical professionals. The new APA will apply to whatever adjudicatory format is prescribed by agency-specific reform legislation.

11. Under Proposed Government Code section 643.320, prosecutory and adjudicative functions must be separated within the agency. This is accomplished by isolating the presiding officer and the agency heads from receiving advice from staff members who played adversarial roles in the case.

12. The Attorney General opposes this provision. See Appendix B of the AG's letter cited in note 4, *supra*.

13. Currently, a few agencies have emergency "interim suspension" authority, including the State Bar, CAL. BUS. & PROF. CODE § 6007(c), the Medical Board of California, CAL. GOV'T CODE § 11529, and other occupational licensing agencies within the Department of Consumer Affairs, CAL. BUS. & PROF. CODE § 494.

14. CAL. GOV'T CODE § 11507.6.

15. The Commission is suggesting certain changes in APA discovery, such as making discovery orders enforceable at the agency level rather than requiring trips to the superior court and introducing a system of continuing disclosure. Proposed CAL. GOV'T CODE §§ 645.210, 645.320.

16. CAL. GOV'T CODE § 11340 *et seq.*

17. See *id.* at §§ 11349(a), 11349.1(a)(1).

18. See Proposed CAL. GOV'T CODE §§ 633.040, 633.050.

19. The AG also furnished a long list of specific changes he would favor in the Commission's draft if it decides to go forward with its more comprehensive approach. A copy of the AG's letter may be obtained from the Commission. See *supra* note 2.



VIAL COMMITTEE RECOMMENDS PUC REFORMS

By Michael Asimow¹

The staid world of public utility regulation is being blasted by the winds of change. The forces of deregulation are gathering strength. It is clear that the utility world of the future will be regulated far more by market forces than by state utility commissions. It will no longer be possible to take six years to fix a utility's rates when dynamic forces change markets on a daily basis.

How should the California Public Utilities Commission (PUC) regulate when its role is no longer to set cost-of-service prices for regulated monopolies but to protect consumers, assure adequate supplies, and help utilities adapt in a world of competitive markets? In addition to its struggle to cope with this frightening new world, the PUC has been afflicted by problems largely of its own making, such as the recent IRD fiasco.²

To address these issues, an advisory committee chaired by former PUC President Donald Vial³ recently recommended significant changes in Commission procedures. Appointed by the Senate Committee on Energy and Public Utilities,⁴ the Vial Committee took a fresh look at PUC management and procedure and recommended some fundamental changes. Among the many suggestions in its report, perhaps the following are the most important.

The Management Forum. The PUC needs much stronger management. At present, the perception is that nobody actually makes management decisions about how to deal with pending matters or how to scope the issues to be resolved in pending cases.

The Vial Committee agreed that better management could be achieved by a "Case and Issues Management Forum" to make early decisions about how to handle cases. For example, what procedural format is appropriate (rulemaking or adjudication)? What issues should be resolved, and which ones deferred? What staff resources should be assigned to a pending matter? The Forum should, ideally, consist of the PUC President, the assigned commissioner,⁵ and as many of

the other commissioners as possible, in addition to key staff members.⁶

Bagley-Keene Open Meeting Act Revisions. In order to implement this highly desirable management reform, however, the Bagley-Keene Open Meeting Act⁷ must be amended. All five commissioners should be encouraged to participate in the Forum, but Bagley-Keene prohibits meetings of more than two commissioners without full compliance with the open meeting law.

The PUC has been bedeviled by Bagley-Keene on a number of occasions.⁸ Experience in California and in other states makes it clear that frank discussion of difficult problems does not occur in open meetings. Commissioners must be able to disagree, candidly and vigorously, with one another in ways they will never do when the public is watching. Staff must be willing to correct commissioners, although they know they must never make their bosses look bad in public meetings.

Thus, we must choose between letting the PUC deliberate in closed meetings or allowing it to be run with no deliberation at all.⁹ As a result, the Vial Committee unanimously favored a narrowly-tailored Bagley-Keene Act exception to permit the PUC to conduct closed meetings concerning preliminary and procedural aspects of pending cases. The Commission would never consider the merits of the substantive issues at these meetings—only the non-substantive but vital management issues.

Greater Use of Rulemaking. The PUC is enslaved by a trial mentality. It makes policy largely through case-by-case adjudication, often in the form of ponderous cost-of-service ratemaking cases conducted by its administrative law judges (ALJs). The trials feature endless cross-examination of a parade of expert witnesses by counsel for all parties (including many intervenors). The Vial Committee believes that the new realities of utility regulation no longer permit the luxury of policymaking through courtroom theatrics.



COMMENTARY

Thus, the Vial Committee favored much greater use of rulemaking by the PUC.¹⁰ The trial culture of the agency has inhibited it from trying to grapple with policy issues through rulemaking, but rulemaking is far better adapted for policymaking than is adjudication. The PUC must be able to establish the ground rules for utility participation in competitive markets, then get out of the way. A majority of the Committee members agreed that the legislature should establish a rebuttable presumption that policy should be made through rulemaking rather than adjudication, but there was disagreement on this point.

Although the PUC is largely exempt from the statute which governs the rulemaking process in other state agencies,¹¹ the Vial Committee believes that the PUC should comply with some of the requirements of that statute. Thus, the Committee agreed that the public must be adequately notified of proposed rules and have adequate opportunity to comment in writing and orally. The PUC should be required to open its files so that the public can examine its methodology. Also, the PUC should be required to respond in the final rule to significant criticisms or alternative suggestions offered by the public. And the public should be permitted to petition for adoption of a new rule or for modification or repeal of an existing one. The Commission also needs to explore intervenor funding in rulemaking so that all interested parties can afford to take part in the process.

There was also agreement that *ex parte* contacts might be less stringently regulated in rulemaking than in adjudication.¹² For example, *ex parte* contacts in the rulemaking process might be unregulated up until the deadline for filing the last round of comments; thereafter, *ex parte* contacts would have to be disclosed and placed on the record.

In addition, the Committee generally agreed that the PUC should experiment with less formal rules, such as policy statements, that can be adopted without time-consuming public participation. Policy statements inform both outside parties and the staff of how the Commission intends to exercise a discretionary power in the future. Policy statements are tentative, not binding, but are very helpful to anyone who must predict what the PUC will do. Also, policy statements are useful in that they guide the staff's exercise of discretionary regulatory powers.

PUC Decisionmaking: Conference Hearings. If the PUC must adjudicate—

and often it must, it should be clearly empowered to conduct informal rather than formal hearings in cases where determination of credibility is not at issue. In an informal or "conference" hearing, the ALJ would have power to dispense with cross-examination and other trial-type procedures. Trial-type procedure is appropriate and necessary when the issue to be determined is truth-telling. But it is very inefficient and costly both to members of the public and to the Commission itself when the PUC is seeking to determine questions of legislative fact, law, or policy.

The concept of a conference hearing has been adopted in numerous states and in the Model State Administrative Procedure Act of 1981.¹³ In such hearings, experts offer written testimony and all parties may submit written and oral arguments. Cross-examination is not employed. It is unclear whether the PUC is authorized to conduct informal hearings under its existing statute; the Vial Committee favors legislative action to clearly empower to PUC to use this approach.

Separation of Functions. The Division of Ratepayer Advocates (DRA) is an independent entity within the PUC charged with reviewing and analyzing utility applications, participating in evidentiary hearings, and making recommendations in the best long-term interests of utility ratepayers. Because DRA frequently participates as a party in adjudicative proceedings, present PUC rules separate the staff members of DRA from participation in decisionmaking. The Commissioners are advised only by members of the Commission Advisory and Compliance Division (CACD), not by DRA staff members. The Vial Committee rejected a proposal that DRA be made even more independent by, for example, removing it from the Commission or allowing it to appeal PUC decisions to the Supreme Court.

But the Committee did not reach consensus on whether the existing system of separation of functions might be relaxed. For example, it might be possible to allow DRA staff members who have not worked on a particular case to advise the Commission in non-prosecutory adjudicative proceedings, as opposed to the present rule that excludes all DRA staff from all advice-giving.¹⁴ It might also be possible to provide for less separation of functions in rulemaking than in adjudication,¹⁵ or to permit DRA to participate in closed meetings of the Case and Issues Management Forum.¹⁶ Some members favored allowing the director of DRA to sit with the Forum since DRA

is a key part of the staff with great expertise and experience. Its participation in making management decisions could be very helpful. In addition, decisions concerning allocation of PUC resources affect DRA greatly. Other members of the Vial Committee disagreed; they believe DRA should never have any more access or opportunity for input than any other party.

Alternative Dispute Resolution. The PUC has made large strides in implementing alternative dispute resolution (ADR) procedures.¹⁷ Even more can be achieved by using the processes of negotiation, mediation, and arbitration to settle disputes. ADR is an absolute necessity in the brave new world of utility competition. Many times, parties working together can come up with a win-win settlement that is far superior to what an agency could achieve through adjudication. Even when an all-party settlement cannot be achieved, the process of trying to achieve one can be very constructive and may furnish the PUC with the basis for an adjudicated outcome.

In addition, the PUC needs to experiment with negotiated rulemaking. Federal agencies report great success with "reg-neg," and the federal APA now requires all agencies to consider this option. Not all disputes, and not all proposed rules, can be negotiated, but many can.

The Vial Committee also took a look at the PUC's practice of conducting workshops on pending problems. Workshops are informal decision-facilitating forums. They seem to work very well and the Committee recommended that the PUC adopt comprehensive workshop guidelines.

CONCLUSION

If adopted, the Vial Committee's suggestions would make fundamental changes in the way PUC does business. All utility professionals should be aware of the Vial Committee report and furnish input to the PUC and the legislature about its suggestions.¹⁸

ENDNOTES

1. Professor of Law, UCLA School of Law.

2. The PUC's September 17, 1993 Implementation Rate Decision (IRD) fundamentally restructured telephone rates to accommodate competition in the provision of toll call service. On the night before the decision was released, staff members from the telephone com-



panies came to the PUC's offices and helped to write portions of the decision. When this conflict was disclosed, the PUC felt compelled to rescind its decision. See Peter Arth, Jr., Lynn T. Carew, Kenneth K. Henderson, *Report to the Commission: A Review of the Events Surrounding D.93-09-076 (IRD)* (Oct. 13, 1993); see also 14:1 CAL. REG. L. REP. 166 (Winter 1994).

3. The author was a member of the Vial Committee. Other members included Vice-Chair Barbara Barkovich, a San Francisco attorney; Lynn T. Carew, Chief Administrative Law Judge of the PUC; Robert C. Fellmeth, Price Professor of Public Interest Law at the University of San Diego School of Law and Director of the Center for Public Interest Law; Wesley Franklin, Assistant Executive Director of the PUC; Arturo Gandara, Professor of Law, UC Davis School of Law; Frederick E. John, President of Southern California Gas Company; Martin Mattes, a San Francisco attorney; and G. Mitchell Wilk, former President of the PUC. The Vial Committee was assisted by David M. Gamson, Senior Consultant to the Senate Committee on Energy and Public Utilities. The opinions expressed in this article are the author's alone.

4. The chair of the Senate Committee is Senator Herschel Rosenthal. Senator Rosenthal appointed a Subcommittee on PUC Reforms which includes himself, Senator Newton Russell, and Senator Alfred Alquist.

5. In all formal proceedings, one of the PUC commissioners is assigned to guide the case through PUC processing. An administrative law judge conducts public hearings, advises the assigned commissioner of major developments, and prepares a recommended decision for Commission vote. The assigned commissioner then places that case on the agenda of the full Commission for final decision. Sometimes the assigned commissioner prepares an alternative decision to compete with the ALJ proposal.

6. These include the PUC's Executive Director and its General Counsel. For discussion of whether the director of the PUC's Division of Ratepayer Advocates (DRA) should be allowed to sit with the Forum, see *infra* text at note 16.

7. CAL. GOV'T CODE § 11120 *et seq.*

8. See, e.g., letter from Floyd D. Shimomura, Assistant Attorney General, to PUC President Daniel W. Fessler (Mar. 4, 1994), which is printed as an appendix to *Recommendations of the Advisory Group to the Subcommittee*, Informational Hearing of the Senate Subcom-

mittee on Public Utilities Commission Reforms (Mar. 8, 1994) (hereinafter "Informational Hearing"). This letter alleges that several closed meetings concerning PUC organization violated the Bagley-Keene Act. The PUC's practice of "seriatim meetings," see *infra* note 9, has also been questioned as possibly violative of Bagley-Keene.

9. If open meeting laws apply, the general experience has been that they will be circumvented. For example, there will be "seriatim meetings" (President speaks to Commissioner A, then to B, C, and D). Or staff members representing each commissioner will meet to make decisions based on the views of their bosses. The actual open meetings tend to be carefully scripted performances in which no serious deliberation takes place. These are clearly suboptimal decisionmaking modalities. See Ashley C. Brown, *Sunshine May Cloud Good Decision Making*, F. FOR APPLIED RESEARCH & PUB. POL'Y (Summer 1992).

10. The PUC is fortunate to be almost wholly exempted from the onerous rulemaking provisions of the California Administrative Procedure Act (APA), CAL. GOV'T CODE § 11340 *et seq.*, including the requirement of approval of rules by the Office of Administrative Law. CAL. GOV'T CODE § 11351(a). See Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 48-51 (1992), for a brief description of the APA rulemaking procedure in California. Thus, the PUC is free to structure its own rulemaking procedures in ways that facilitate maximum public input consistent with efficient decisionmaking.

11. See *supra* note 10.

12. The Committee favored more restrictive provisions relating to *ex parte* contacts in adjudication than apply under existing rules. At present, *ex parte* contacts are permitted but must be disclosed. The Committee suggests they be banned after the deadline for filing reply comments.

13. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 4-401, 15 U.L.A. 1 (1990) (hereinafter "Model State APA").

14. The Model State APA, *supra* note 13, would permit such advice-giving. *Id.* at § 4-214(a). The separation of functions provision in the federal APA does not apply at all to ratemaking or similar types of adjudication. See 5 U.S.C. § 554(d)(B). See generally Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

15. The Committee did not reach agreement on separation of functions in rulemaking. It would seem, however, that the customary rigid separation of DRA members from giving advice to the Commissioners might well be relaxed in rulemaking proceedings.

16. Such participation would be permitted by the Model State APA, *supra* note 13, which permits a person who participated in a preliminary determination to serve as a presiding officer or advise a presiding officer in the same proceeding. *Id.* at § 4-214(c).

17. See *Alternative Dispute Resolution: Hearing Before the Public Utilities Commission* (Oct. 12, 1993).

18. An informational hearing has already been held in which numerous interested parties discussed the Vial Committee's recommendations. See Informational Hearing, *supra* note 8. The Vial Committee's final report has been published as *Report of Advisory Working Group on CPUC Reforms to Senate Subcommittee on Public Utilities Commission Reforms of Senate Committee on Energy and Public Utilities* (June 1, 1994).

